Supreme Court, U. S.
FILED
JAN 25 1979
JAMES R. BRODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

—v.—

BRIAN F. WEBER, et al.,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

—v.—

BRIAN F. WEBER,
Respondent.

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

—v.—

BRIAN F. WEBER, et al.,
Respondents.

BRIEF *AMICUS CURIAE* OF THE NATIONAL COORDINATING COMMITTEE FOR TRADE UNION ACTION AND DEMOCRACY

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BRIEF *AMICUS CURIAE* OF THE NATIONAL COORDINATING COMMITTEE FOR TRADE UNION ACTION AND DEMOCRACY

INTEREST OF AMICUS CURIAE[1]

The National Coordinating Committee for Trade Union Action and Democracy is an organization which was formed to provide a structure within which the various elements of the growing rank and file labor movement could join together in support of their common interests. Throughout the life of the Committee, it has stressed the importance of providing women and minority people with the jobs and opportunities that they have been denied due to discrimination and its effects. This is based upon an understanding that the rank and file members of the labor movement will only achieve their legitimate goals in life if no section of that movement is deprived of the right to strive for those goals. In furtherance of this understanding, the Committee has consistently, since its formation in 1970, encouraged and supported the use of affirmative action plans to correct the effects of past discrimination in the work places of this country.

[1] This brief is filed with the consent of the parties. The letters of consent are being filed concurrently with this brief.

ARGUMENT

I.

THIS CASE WAS IMPROPERLY BEFORE THE DISTRICT COURT DUE TO THE ABSENCE OF INDISPENSABLE PARTIES WHO, ALONE, HAD AN INTEREST IN PROVING PAST DISCRIMINATION AS A BASIS FOR THE AFFIRMATIVE ACTION PLAN CONTAINED IN THE COLLECTIVE BARGAINING AGREEMENT.

At the trial level, where the factual record in this case was made, the only parties to this case were Weber, acting for himself and on behalf of the allegedly discriminated-against white employees, and Kaiser Aluminum & Chemical Corporation (hereinafter "Kaiser") and the United Steelworkers of America, AFL-CIO-CLC (hereinafter "USWA"), the signers of the collective bargaining agreement which included the affirmative action plan in question. None of these parties had any interest in proving past discrimination against the present or potential black employees in this case. Weber was not interested because it would hurt his case, and neither Kaiser nor USWA were interested because to admit past discrimination would open themselves to a likely barrage of cases relying on that admitted past discrimination. Thus the issue of whether or not there existed any illegal past discrimination at Kaiser's Gramercy, Louisiana plant, was without an antagonist.

The dissenting opinion of Judge Wisdom of the Court of Appeals quite forcefully noticed this fact:

> The reason for the lack of analysis [of past discrimination] is clear: no litigant wanted to see past discrimination found. The plaintiffs knew it would weaken their case. Kaiser and the Union could only admit past discrimination by strongly inviting private suits by blacks. Although the trial

> below was in no way collusive, the defendants could well have realized that a victory at the cost of admitting past discrimination would be a Pyrrhic victory at best. In the district court no one represented the separate interests of the minority employees of Kaiser, the only people potentially interested in showing past discrimination. *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 231 (5th Cir., 1977).

Likewise, even the majority opinion for the Court of Appeals admitted that the issue of whether there was past discrimination by Kaiser or USWA was not in dispute.

> The district court found, and appellants all but concede, that Kaiser has not been guilty of any discriminatory hiring or promotion at its Gramercy plant. *Weber, supra* at 224 [footnote omitted].

The black employees at the Gramercy plant, the major beneficiaries of the affirmative action plan which is attacked here, were without any representative when this case was before the district court. They are the indispensable parties who are missing from this case, and the only parties who are, or were, interested in proving past discrimination against them because of their race.

Under Article III, Section 2 of the United States Constitution, the judicial power extends only to "cases" and "controversies".

> In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

In the instant case, there exists no adversary relationship between the parties who were before the District Court, with respect to the issue of whether there exists past discrimination against black employees at Kaiser's Gramercy plant. Yet, it is just this issue upon which the majority for the Court of Appeals says the case turns. *Weber, supra* at 224. In just such cases in the past, where there was an absence of an indispensable party to a controversy, this Court has mandated the dismissal of the action. *California v. Southern Pacific Company*, 157 U.S. 229, 251 (1895); *Commonwealth Trust Company of Pittsburgh v. Smith*, 266 U.S. 152, 159 (1924). This is especially necessary when "an important public interest is at stake" such as the placing in jeopardy of all voluntary affirmative action plans in the country. *United States v. Johnson*, 319 U.S. 302, 304 (1943).[2]

In addition to the above reasons, the black employees of Kaiser's Gramercy plant are also third party beneficiaries of the collective bargaining agreement between Kaiser and USWA. As such, they are entitled to enforce this agreement in District Court under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. See *Vaca v. Sipes*, 386 U.S. 171, 185 (1967). Because of this right to affirmatively bring an action in District Court to protect their interests in the collective bargaining agreement, the black employees of Kaiser's Gramercy plant are the only parties who are in a position to defend their interests in that agreement.

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[2] Although the issue of the appropriate allocation of power between the three branches of government is also a matter relevant to the "cases" or "controversies" question, this issue will not be argued other than to mention that the development of public policy with respect to remedying the past effects of societal discrimination is more appropriately left to the Executive branch (through Executive Order No. 11246 and the Office of Federal Contract Compliance) and the Legislative branch (through debates on the changes in legislation such as the 1972 proposed amendments to Title VII—see *Weber, supra* at 238) rather than judicial intervention.

This is so especially when their union, the USWA, has a contrary interest in keeping free of any taint of responsibility for any past discrimination.

II.

VOLUNTARY AFFIRMATIVE ACTION PROGRAMS SHOULD BE CONSIDERED PRESUMPTIVELY VALID, WHEN SUPPORTED BY STATISTICS WHICH SHOW A DISPARATE IMPACT UPON THE CLASS OF EMPLOYEES WHICH THE AFFIRMATIVE ACTION PROGRAM WAS DESIGNED TO HELP.

A. Judicially Ordered Affirmative Action Plans To Remedy The Effects Of Past Discrimination Are Valid.

Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), provides a broad grant of authority to the courts to develop affirmative action plans to remedy the effects of past employment discrimination, by providing preferential treatment to the discriminated-against class. *Franks v. Bowman Transportation Company*, 424 U.S. 747, 763-770 (1976); *Local 189, United Papermakers and Paperworkers v. United States*, 416 F.2d 980 (5th Cir., 1969), *cert. den.* 397 U.S. 919; *United States v. International Brotherhood of Electrical Workers, Local No. 38*, 428 F.2d 144 (6th Cir., 1970), *cert. den.* 400 U.S. 943.

B. Affirmative Action Plans Mandated By Executive Order No. 11246 To Correct The Effects Of Industry-Wide Discrimination Are Valid.

Executive Order No. 11246, 3 C.F.R. § 339 (1964-65 compilation), provides for affirmative action plans to remedy the disproportionately low number of minority people in the construction industry, when working on federal contracts. The beneficiaries of these plans are not necessarily those individuals who were discriminated against in the past, but rather are of the same racial class. These plans have been specifically upheld by the

courts as Constitutional. *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3rd Cir., 1971), *cert. den.* 404 U.S. 854; *Southern Illinois Builders Association v. Ogilvie*, 471 F.2d 680 (7th Cir., 1972). Thus, the courts have validated affirmative action plans which provide for preferential treatment to be given to members of a discriminated-against class, even though the particular members of that class have not individually suffered the effects of the class-wide discrimination.

C. The Purpose Of Title VII Is To Provide Equality Of Employment Opportunity And To Remove The Barriers That In The Past Have Favored White Employees Over Other Employees, And, To The Extent Possible, To Accomplish This By Voluntary Means.

It is generally understood that the purpose of Title VII "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Company*, 401 U.S. 424, 429-430 (1971); See also, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 348 (1977). This characterization is clearly to protect the minority classes from the majority, privileged class of white males. In individual instances, a white male may claim protection under Title VII for overt discrimination against him because of his race or sex, but this Court has never held that white males, as a class, are discriminated against because of the implementation of an affirmative action program. *McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273, 281, fn.8 (1976).

Further, the statutory intent is to correct the discriminatory employment practices through voluntary

compliance rather than through litigation. Litigation is the procedure available to the Equal Employment Opportunity Commission (hereinafter "EEOC") after attempts at conciliation fail. "Congress chose to encourage voluntary compliance with Title VII by emphasizing conciliatory procedures before federal coercive powers could be invoked." *Emporium Capwell Company v. Western Addition Community Organization*, 420 U.S. 50, 72 (1975). See also, *Occidental Life Insurance Company of California v. Equal Employment Opportunity Commission*, 432 U.S. 355, 367-368 (1977).

In addition to the conciliation process mandated by the Act prior to the institution of any court action by the EEOC, the Act contemplates that there will be voluntary compliance without the intervention of the EEOC at all. This is based, in part, upon the threat of a possible future court action.

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Company v. Moody*, 422 U.S. 405, 417-418 (1975), quoting from *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir., 1973).

The utilization of the collective bargaining agreement as the vehicle through which voluntary remedial action is to be taken is the easiest and most practical method for employers and unions to come to an understanding about how they will resolve the disparate impact various practices have had on different classes of employees. This Court, in *Franks v. Bowman Transportation Company*, 424 U.S. at 778-779, stated:

> The Court has also held that a collective-bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the "highest priority," is certainly no less than in other areas of public policy interests. *Pellicer v. Brotherhood of Ry. & S.S. Clerks*, 217 F.2d 205 (CA5 1954), cert. denied, 349 U.S. 912 (1955).

As seen above, this Court has given its approval to the collective bargaining process to go beyond what is required by Title VII in order to eliminate the effects of discrimination on the basis of race. This can only be interpreted as a mandate for all employers and unions to implement affirmative action plans to remedy all disparate impact on employees on the basis of race. Kaiser and USWA have heeded the Court's advice and implemented an affirmative action plan which rectifies the disparate impact felt by black employees and other minorities in the craft areas. *Weber*, contrary to the Court's intent, has disrupted that affirmative action plan.

D. If *Weber* Is Upheld, The Result Of This Case Will Be The Complete Destruction Of All Voluntary Affirmative Action Plans.

Assuming, *arguendo*, that the Court were to affirm the Court of Appeals and rule in favor of Weber, it is instructive to see that the effect of such a decision would constitute the complete destruction of the Congressional purpose behind Title VII. First, all affirmative action plans, instituted without the intervention of the govern-

ment, would be voluntarily dismantled. Failure to do so would result in either alleged "reverse" discrimination against whites who are overstepped by such plans, or an admission of past discrimination which would likely lead to numerous lawsuits being brought by blacks, or other minorities, taking advantage of this admission. No employer or union would desire to be caught in such a trap.

Second, affirmative action plans implemented during the conciliation stage of the Title VII procedure, are likely to be discarded. Usually those plans are implemented pursuant to a specific disclaimer as to liability or commission of wrongdoing. In the face of this disclaimer, the affirmative action plan has just as much validity as if it were entered into voluntarily.

Finally, those affirmative action plans entered into as a result of a consent decree, without any significant fact-finding by the Court, would be reevaluated and, most likely, set aside, since they are not based upon proof of past discrimination.[3]

The result of this would be a significant increase in the number of Title VII cases that are filed and processed to trial. In addition, there would be a greater increase in disparate impact on minority employment, since only judicially-ordered affirmative action plans would be in effect.

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[3] The most famous consent decree came in the case of *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir., 1975), and essentially provided an industry-wide affirmative action plan for the steel industry which served as the model for the instant affirmative action plan. The consent decree court "has issued an order to show cause why changes are not required in the decree in light of the decision below". *USWA v. Weber*, No. 78-432, Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed September 14, 1978, at 11.

The exact opposite of the purpose for Title VII would be obtained if Weber is successful in this action.

E. Judicial Sanction Should Be Granted To Voluntary Affirmative Action Programs.

Instead of undermining the purpose and intent of Title VII, the Court should bolster that purpose, by placing the stamp of approval on voluntary affirmative action plans. Any affirmative action plan which is entered into in order to correct a disparate impact upon a racial or gender-based class, which can be shown by way of statistics, should be presumed to be valid, subject to rebuttal by evidence that such disparate impact is not lessened by said plan.

Only through this utilization of presumptive validity for affirmative action plans, which have the effect of correcting disparate impacts on minority peoples, can the concept of voluntary compliance with Title VII be preserved. Anything short of this standard will result in the complete emasculation of voluntary compliance.

III.

PROOF OF PAST DISCRIMINATION BY KAISER EXISTS IN THIS CASE, REQUIRING THE APPROVAL OF THE AFFIRMATIVE ACTION PLAN TO CORRECT THE PAST DISCRIMINATION, OR REMAND FOR FURTHER EVIDENCE.

Proof of discrimination, which constitutes the reason for the implementation of the affirmative action plan in this manner, can easily be shown by way of statistical evidence. Such evidence is sufficient to establish, at a minimum, a *prima facie* case that there exist effects of past discrimination requiring the remedy of affirmative action. *International Brotherhood of Teamsters v. United States*, 431 U.S. at 339. Based upon the statistics provided by Judge Wisdom in his dissenting opinion,

Weber, supra at 228, the black workforce constitutes 39 per cent of the available workforce in the parishes from which Kaiser's Gramercy plant draws, although only 14.8 per cent of the workforce actually at the Gramercy plant is black. Of the craft employees, less than 2 per cent (five out of 290 employees) are black. These statistics, on their face, create a *prima facie* case that there was prior racial discrimination, which is unrebutted. This evidence requires the reversal of the Appellate Court's decision, since it refutes the fact upon which that decision rests.

CONCLUSION

Amicus Curiae files this brief to urge the Court to reverse the judgment and opinion of the Court of Appeals with instructions to the District Court to dismiss the case. In the alternative, *Amicus Curiae* recognizes that the evidentiary record in this case is less than complete, and so urges the Court to remand the case to the District Court with instructions to develop a full and complete record, with full representation for all parties of interest.

Respectfully submitted,

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